

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0291

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 27, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, and that claimant was disqualified from receiving unemployment insurance benefits effective February 2, 2020 (decision # 81803). Claimant filed a timely request for hearing. On March 24, 2020, ALJ Monroe conducted a hearing, and on March 27, 2020, issued Order No. 20-UI-147048, affirming the Department's decision. On April 10, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument in reaching this decision.

FINDINGS OF FACT: (1) T Mobile USA Inc. employed claimant as a customer care account expert from February 2016 until February 3, 2020.

(2) The employer expected a customer care account expert to remain on every customer call until they had answered the customer's questions and resolved the customer's issue. If there was "dead air" on the line, the employer expected the account expert to state a "dead air" script twice before ending the call to ensure the customer had an opportunity to respond. Transcript at 10. Claimant understood these expectations.

(3) In January 2020, claimant asked the senior manager for assistance because he noticed that he was having too many "dropped" calls. Transcript at 15. The calls were ending too soon, and the customers were calling claimant back. On January 21, 2020, the senior manager and claimant together reviewed

audio and video recordings of nine of claimant's recent calls that had ended in less than 30 seconds. The videos showed the computer cursor moving to the section of the computer screen that contained a red "end call" button, and showed the cursor "scroll over on each incident over to that button to actually physically end the call." Transcript at 9. The customers' issues had not been resolved before the calls ended. Some of the calls ended while a customer was stating their issue; some had no talking, but ended before claimant stated the "dead air" script. When the senior manager asked claimant for an explanation, claimant did not know why the videos appeared to show that he ended the calls before the customers' issues were resolved or before stating the "dead air" script. The senior manager suspended claimant at that time to investigate claimant's other recent calls.

(4) The employer audited claimant's calls from December 1, 2019 through January 21, 2020 and found 152 of claimant's calls during that time ended in less than 30 seconds. Of the 152 calls, 94.81% of those customers called back immediately. Two of claimant's coaches reviewed a random selection of 45 of the 152 calls. The senior manager told claimant that the coaches' review showed that in 44 of the 45 calls, video of the calls showed that claimant ended the calls in less than 30 seconds.

(5) On February 3, 2020, the employer discharged claimant because claimant allegedly intentionally released 44 calls during December 2019 and January 2020 without first resolving the customers' issues or stating the "dead air" script.

CONCLUSIONS AND REASONS: The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a) (December 23, 2018). "[W]antonly negligent' means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee." OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Order No. 20-UI-147048 concluded that the employer discharged claimant for misconduct, reasoning that the evidence showed that, more likely than not, claimant deliberately ended the 44 calls reviewed by his manager and coaches, and in doing so, willfully violated the employer's reasonable expectations.¹ The order under review reasoned that despite claimant denying that he intentionally ended calls before resolving the customers' issues or stating the "dead air" script, the employer's video and audio recordings outweighed claimant's denial because claimant was unable to explain what the video and audio recordings showed.² The order also reasoned that claimant's conduct in ending the calls was not excusable as a good faith error, and was not excusable as an isolated instance of poor judgment because

¹ Order No. 20-UI-147048 at 3.

² Order No. 20-UI-147048 at 3.

it was a repeated act.³ However, because the preponderance of the evidence does not show that claimant intentionally ended the calls, the record shows that claimant was discharged, but not for misconduct.

As a preliminary matter, the employer's evidence regarding the calls that neither claimant nor his senior manager reviewed, including the calls that the two coaches reviewed, was outweighed by claimant's firsthand evidence regarding those calls. At hearing, claimant denied that he intentionally ended calls before resolving customers' issues or stating the "dead air" script. Transcript at 27. With no other firsthand witness to at least 122⁴ of the calls other than claimant, claimant's denial was more persuasive than the hearsay regarding the calls the coaches reviewed, or the presumption that claimant intentionally ended the 107 calls that the employer did not review. Thus, to the extent that the employer discharged claimant for his conduct during the calls that the senior manager did not review, the record does not show by a preponderance of the evidence that claimant consciously disconnected the calls before resolving customers' issues or stating the "dead air" script. Therefore, the record does not show that claimant engaged in a willful or wantonly negligent disregard of the employer's expectations as to those calls.

The next issue is whether the record showed that claimant intentionally ended the nine calls he and the senior manager reviewed in January 2020, and testified about at hearing. Although claimant agreed that the video recordings he viewed with the senior manager showed "the mouse gets over the . . . red end call [button]," claimant also denied that he intentionally ended the calls by hitting the red "end call" button. Transcript at 27. As the order under review stated, claimant testified at hearing that he "[did] not know" why the video recordings showed the computer "mouse . . . hitting the red end call button to end the call." Transcript at 27. Claimant testified that that he did not know if "he was doing that or not," or "why it showed that." Transcript at 31. The video recordings are not in evidence to support the employer's testimony that claimant intentionally ended the calls. Although claimant may not know why the videos apparently showed something inconsistent with his recollection of what he did during the calls, the testimony in the record is not sufficient to establish that claimant acted *consciously* to end the calls using the red "end call" button. In other words, although the preponderance of the evidence may show that claimant ended the calls, it does not show that claimant ended the calls willfully or with a wantonly negligent disregard for the employer's expectations. The record does not show that claimant's conduct was more than carelessness or ordinary negligence, which are not misconduct. In the absence of such evidence, the employer had not met its burden to show that it discharged claimant for misconduct for intentionally ending customer calls.

The employer failed to establish that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 20-UI-147048 is set aside, as outlined above.

³ Order No. 20-UI-147048 at 3.

⁴ The record is not clear if the employer's senior manager reviewed any of the 45 calls selected from the 152 calls for review. He testified about instructing claimant's coaches to "listen to 15 calls each." Transcript at 42. If the senior manager did review 15 of those calls, it would not change the outcome of this decision.

D. P. Hettle and S. Alba;
J. S. Cromwell, not participating.

DATE of Service: May 7, 2020

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyong ito.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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